



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 8, 2022

Ms. June B. Harden
Assistant Attorney General
Assistant Public Information Coordinator
Office of the Attorney General
Post Office Box 12548
Austin, Texas 78711-2548

OR2022-38130

Dear Ms. Harden:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. This request was originally received by the Open Records Division (“ORD”) of this office and assigned ID# 990644. Preparation of the ruling has been assigned to the Opinion Committee.

The Office of the Attorney General (“OAG”) received a public information request for four types of records related to a named individual within a specified date range. You tell us that the OAG does not maintain responsive information with respect to two types of records. And you tell us the OAG will release, with redactions required by law, information responsive to the other two types of records. You claim the document submitted in Exhibit B is excepted from disclosure under Government Code section 552.107. We have considered the exceptions you claim and reviewed the document submitted in Exhibit B.

Subsection 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. TEX. GOV’T CODE § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Tex. Att’y Gen. ORD-676 (2002) at 6–7. First, a governmental body must demonstrate “the information constitutes or documents a communication.” *Id.* at 7. Second, the communication must have been made for the purpose of facilitating “the rendition of professional legal services to the client” governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client

governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding), *mand. denied*, 12 S.W.3d 807 (Tex. 2000) (stating that the attorney-client “privilege does not apply if the attorney is acting in a capacity other than that of an attorney”). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A)–(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies to only a confidential communication, *see id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those . . . to whom disclosure is made to further the rendition of professional legal services to the client [or those] reasonably necessary to transmit the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding [mand. denied]) (stating that “[t]he issue of confidentiality focuses on the intent of the parties at the time the communications are made”). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Subsection 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (orig. proceeding) (recognizing that the privilege extends to the “entire communication, including facts contained therein”).

You state that the document in Exhibit B “is an internal ORD tracking sheet.” You state that “[t]racking sheets are part of the communications between ORD attorneys and are used in the process of drafting, reviewing, editing, and revising draft letters and rulings before their issuance in final form.” You tell us that “tracking sheets are circulated with the drafts and are used by ORD attorneys to communicate their legal advice and opinions.” You also tell us the “tracking sheet is not intended to be disclosed and is not disclosed to non-privileged parties.” Based on your representations and our review, we conclude that the information you have provided under Exhibit B is subject to the attorney-client privilege and may be withheld under subsection 552.107(1) of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable

charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Charlotte Harper
Assistant Attorney General
Opinions Committee

CH/eb

Ref: ID# 990644

Enc. Submitted documents

c: Requestor
(w/o enclosures)